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May 28, 2004

Via Electronic Mail Only

Mr. Joseph P. DuBray, Jr.
Director, Division of Policy, Planning and Program Development
U.S. Department of Labor
OFCCP, Room C-3325
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments in Response to OFCCP's Proposed Definition of an Internet Applicant/ Changes to 41 C.F.R. Part 60-1

Dear Mr. Dubray:

We are submitting comments in response to the proposed notice of rulemaking that OFCCP published in the Federal Register on March 29, 2004 involving the definition of an Internet applicant.

We represent a substantial number of government contractors across a very broad spectrum of industries. Some of these clients have hundreds of domestic facilities across the United States as well as foreign operations for which they need to conduct uniform recruiting practices. Other clients are small technology start-ups in the Northern Virginia area bidding on Department of Homeland Security contracts while desperately trying to ride out the "tech bust" with a skeleton HR staff. We have heard from so many of them in response to the government's proposed notice and intend below to describe the most important points they ask the government to address.

Our seven (7) comments can be summarized as follows:

1. The OFCCP should clarify how it intends to enforce the record-keeping obligations imposed by the proposed regulation in light of the fact that OFCCP joined with three (3) other agencies (EEOC, DOJ, and OPM) to publish additional questions and answers

regarding the Uniform Guidelines on Employee Selection Procedures. The questions and answers set up a definition of an Internet applicant and record-keeping procedures different than the OFCCP's proposed rule. Question: To the extent an employer is subject to the jurisdiction of OFCCP as well as EEOC and/or DOJ, if it acknowledges on its EEO-1 form that it is a federal government contractor, will it be obligated only to follow the OFCCP's proposed rule and not the different record-keeping standards established through the questions and answers?

2. The proposal to have two different definitions of an applicant: one for "paper" or "hard copy" resumes/applications and the other for Internet applicant should be discarded. The proposed OFCCP definition of an Internet applicant is favored (subject to our additional comments below) and can be adapted to the collection of demographic information (race and gender) in non-electronic settings.

3. If the OFCCP does not intend to eliminate the "original" definition of an applicant that applies to hard-copy or paper resumes, OFCCP should clarify how employers should deal with the common situation in which an employer receives both paper responses and electronic responses to the same job posting. Under the proposed rule, the employer would be permitted to apply the "basic, advertised" qualifications test only to the electronic submissions and not to the paper submissions. Such a dual standard would not only be burdensome but also virtually impossible to follow.

4. OFCCP should clarify the impact of "elimination" questions either under the "basic, advertised qualifications" prong or the fourth prong of the definition in which the candidate becomes "no longer interested" in the vacant position. For example, assume an employer maintains a resume database into which it has scanned the resumes of candidates who applied for past vacant positions but were not selected. The employer now has another position vacancy. It searches the database using key words that are linked to the basic, advertised qualifications it described in the new position announcement. It retrieves 20 resumes of candidates that match its job requirements. A recruiter is assigned to contact each of the 20 candidates to confirm that the candidate is interested in the newly-available position but the candidate seeks a salary that is "way out of line" with the employer's requirements. As such, the employer clearly is no longer interested in this candidate. Does the employer still have an obligation to solicit race and gender from this applicant?

5. If an employer conducts a search of its database using key words and arrives at a reasonable pool of candidates, would OFCCP expect the employer to retain the search criteria for two years from the date the position is filled? With respect to the "no longer interested" in the position prong of the definition, what, if any, information is the

employer obligated to retain on persons whose names appeared on the search list but who indicated that they were not interested in the position?

6. The government's estimate of the cost of the proposed regulation grossly understates the cost of compliance.

7. The OFCCP should impose a rolling prospective implementation date similar to the manner in which it implemented the regulatory changes to 41 CFR Part 60-1 and 60-2 in the year 2000 to give companies sufficient time to comply.

We elaborate on these summary comments below.

I. Because the OFCCP's Proposed Rule and the Multi-Agency Questions and Answers to the UGESP Set Up Different Record-Keeping Standards, the OFCCP Should Clarify Employer Record-Keeping Obligations For Companies Subject to Both

The OFCCP joined with the EEOC, DOJ, and OPM on March 4 to issue additional questions and answers to clarify application of the Uniform Guidelines on Employee Selection Procedures to Internet Applicants ("the joint agency guidance"). Under the joint agency guidance, Question 96 explains that in order for someone to be counted as an applicant for demographic record-keeping purposes, (1) the employer must have acted to fill a position; (2) the individual must have followed the employer's standard procedure for submitting applications; and (3) the individual must have indicated an interest in the particular position.

Because this definition does not include a "basic, advertised qualifications" prong of the OFCCP's proposed rule, the clear preference would be to solicit race and gender demographic information only on a minimally qualified population, not the larger pool. Without the basic, advertised qualifications prong, contractors will continue to spend vast amounts of time and resources soliciting useless information having no practical effect on adverse impact calculations.

Consider the following example. Contractors that are engaging in "affirmative action" are reaching out to women and minorities to apply to vacant positions in underutilized job groups. If a contractor has affirmatively recruited, there should be more women and minorities in the applicant pools than white males for position vacancies in job groups that are underutilized. However, not all who respond are qualified for those vacant positions. Thus, over time the aggregate applicant pools within the entire job group are likely to show a greater percentage of females and minorities being rejected than males and whites. As a result, the IRAs for females and minorities are often below 80%, causing the OFCCP to devote administrative resources to investigation of the cause, only

to learn that the cause was because the vast majority of the rejected applicants could not meet the basic, advertised qualifications.

Government contractors should not have to track "applicants" who clearly are not qualified. As such, we would propose that any company that acknowledges in its EEO-1 filing that it is a non-exempt federal government contractor be held to comply only with the OFCCP's definition of an Internet applicant, regardless of whether it is the OFCCP, EEOC, or DOJ that is requesting the information.

II. The OFCCP Should Eliminate Its "Traditional" Definition of an Applicant and Use Only The Proposed Rule of an Internet Applicant For Applicant Tracking And RecordKeeping

The business reality is that companies are recruiting for the same vacancies using every possible recruitment option available. Employers are accepting resumes by email, by fax, by mail, at job fairs, and the like. In addition, those employers that continue to accept paper applications often scan them and accompanying resumes into databases so that recruiters will have the ability to search the entire pool of hard copy resumes and electronic submissions simultaneously. To separate out "traditional" paper submissions from electronic submissions and apply different standards to each defies common sense and is too burdensome a task to implement.

III. If the OFCCP Intends to Leave In Place the Traditional Definition of An Applicant for Paper or Hard-Copy Submissions, It Needs to Clarify How Employers Are Expected to Track A Mixed-Source Pool

Our clients favor having one definition in part because of their concern for how their recruiters are going to deal with the situation in which they accept paper resumes and electronic submissions in response to the same vacancy announcement. Under the traditional definition, once the employer has announced a position vacancy and solicited candidates, the OFCCP expects the employer to obtain the race and gender of everyone who is interested in the position, including candidates that are not qualified or who would not meet the basic, advertised qualifications for the position. Then the employer will have to add to that group or "pool" those qualified individuals who applied electronically. The result will be a mixed-source applicant pool that includes both qualified and interested candidates and those who are unqualified and disinterested.

Such a process would not only be burdensome, but from a practical vantage point, it also would force employers to maintain the separate pools both for a different information-gathering process and to rationalize its selection from among both the separate and "mixed" pools.

IV. An Employer Should Be Able To Use Non-Discriminatory Qualification Questions To Determine Basic, Advertised Qualifications

Many of our clients' recruiters include a set of non-discriminatory questions, e.g., salary requirements, to determine whether an individual whose resume they sourced from the Internet is the "right fit" for the position. Most clients will not advertise the salary requirements for the position for competitive and other reasons. Moreover, a candidate who indicates a salary requirement well above the maximum for the range is a candidate that the recruiter will not consider qualified for further referral or consideration.

May employers use a question such as salary requirements to determine whether a candidate meets the basic, advertised qualifications for a position?

V. What Records Must Contractors Retain Regarding Searches, the Original Candidate Pool, and Recruitment Methods Prior to Soliciting Race and Gender?

The proposed rule states that contractors are required to retain all submissions of interest through the Internet or electronic technologies, but it is silent regarding any additional records that contractors are obligated to retain. For example, if a contractor conducts a search of a resume database that it maintains using key words and arrives at a reasonable pool of candidates, will contractors be obligated to retain the search criteria for two years from the date the position is filled? Will it be permissible to retain only the final search criteria, or will OFCCP expect companies to retain each successive narrowing of the search criteria to test whether the addition of new variables had a disparate impact on women or minorities?

What information must a contractor retain regarding searches of third-party sites, since it is unlikely that OFCCP will be able to replicate the search results because the database will have changed since the employer conducted the initial search?

When a contractor searches third-party sites, e.g., monster.com, and obtains a list of candidates who meet the basic, advertised qualifications for the position, what information will employers be obligated to create or maintain on persons whose names appeared on the search list but who indicated they were no longer interested in the position?

What other records does OFCCP expect contractors to maintain on recruitment efforts prior to the solicitation of race and gender information to be able to demonstrate that the contractor's selection criteria did not have a disparate impact?

With respect to workforce and labor statistics data that the OFCCP will use to determine whether a contractor's selection criteria had any disparate impact, will there be any

connection between the contractor's designation of its external recruiting areas in the two-factor analysis and the labor statistics that OFCCP uses to measure that impact? Will contractors obligated to use United States census data as their reasonable recruiting area in the two-factor analysis whenever the employer searches nationwide sites like Monster.com, or will the employer be able to use more local recruiting areas in its two-factor analysis if it includes a geographic restriction in its search criteria?

VI. The Government's Proposed Estimate of the Burden Grossly Underestimates The Cost of Compliance

The vast majority of the clients we advise currently have no means by which to solicit the race and gender of applicants prior to the interview stage. Those of our clients who have investigated the cost to implement technology that will allow them to collect race and gender information electronically at the "drop off" point or, under the proposed rule, for applicants who meet the basic, advertised qualifications of the position, have discovered that the cost is excessive.

For example, the cost to archive the resumes of every candidate that submits an electronic response to a position vacancy, multiplied by the number of vacant positions and the number of client sites, will be approximately $15,000 per month on average just for storage. (Nine contractor replies on monthly data storage costs). These monthly maintenance costs are in addition to the cost of purchasing the technology and customizing it to allow clients to achieve their recruiting objectives while complying with the government's record-keeping obligations.

None of these costs have been taken into account in the government's burden estimates. In fact, one company that operates in the IT sector requested that we advise OFCCP on its behalf that the cost of compliance is likely to cause them to send jobs outside the United States. The administrative cost of compliance in the US is becoming prohibitive. Recruiting and filling jobs with foreign nationals would mean no obligation to pay for two years of data storage, no self-identification obligation, and no compliance audit exposure.

VII. The OFCCP Should Permit a Rolling Implementation Date Based on Plan Year

The proposed rule would obligate employers to collect demographic information on a population not previously tracked for race and gender. Right now, most employers have their 2004 AAPs in place based on 2003's data. We are five months into 2004, but most of our clients have not been tracking race and gender on the pool of candidates that might otherwise meet the OFCCP's proposed definition.

Assuming the OMB and OFCCP finalize this rule quickly, we would ask the government to allow companies to conform their applicant tracking processes beginning on the first day of their new plan year, with an audit effective date one year after that. Thus, for companies with calendar year plans, they would be obligated to start tracking the demographics of Internet applicants on January 1, 2005, and the first time the government should expect to see complete demographic data files for audit purposes would be audits that commence after January 1, 2006. The 2006 AAP would analyze the 2005 calendar year's hires against an applicant pool for which demographic information was obtained under the strictures of the new rule.

Likewise, if the rule became effective on September 1, 2004, then companies with AAPs beginning on October 1, 2004 would have to begin tracking the demographics as of October 1, 2004, and they would be expected to produce complete applicant flow data in audits beginning October 1, 2005 and after.

If the effective date does not allow companies time to conform prospectively, OFCCP is effectively forcing companies into a conciliation agreement situation from the moment the contractor is selected for audit.

Respectfully submitted,

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